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Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1999

KATHLEEN MOLE,
Petitioner,

vs.

BUCKHORN RUBBER PRODUCTS, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The *Americans with Disabilities Act* requires employers to make reasonable accommodation to the known physical or mental limitations of otherwise qualified employees. The question presented is what is the proper order and allocation of proof in determining whether an employer has violated the ADA by firing an employee known by the employer to be diagnosed with Multiple Sclerosis, specifically:

1. Should the *McDonnell Douglas* burden shifting scheme be used in analyzing failure to accommodate cases brought under the *Americans with Disabilities Act*, an issue as to which the courts of appeals are in conflict.

2. Which party bears the burden of persuasion on the question of whether the employer can reasonably accommodate the known disabilities of an employee?

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_____ ♦ _____

Kathleen Mole respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

_____ ♦ _____

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App., *infra*, A1-A24) is reported at 165 F.3d 1212. The opinion of the United States District Court for the Eastern District of Missouri (App., *infra*, A25-A40) is unreported. A timely petition for rehearing was filed and denied on March 16, 1999 and is reported in the Appendix at A-41.

♦

JURISDICTION

The judgment of the court of appeals affirming the district court's grant of summary judgment was entered on February 1, 1999. Thereafter, on March 16, 1999, the court of appeals denied a timely Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

♦

STATUTORY PROVISIONS INVOLVED

The pertinent statute is 42 U.S.C. § 12112(b) (1994), which provides in pertinent part:

> As used in subsection (a) of this section, the term "discriminate" includes—. . .

> **(5)(A)** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> **(B)** denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant . . ..

STATEMENT OF THE CASE

On or about August 24, 1994, Petitioner Kathleen Mole filed charges of discrimination against Respondent Buckhorn Rubber Products, Inc., under the *Missouri Human Rights Act* with the Missouri Commission on Human Rights, and under the *Americans with Disabilities Act* with the United States Equal Employment Opportunity

Commission. She filed amended charges on or about January 3, 1995. The Commissions issued right-to-sue letters and Ms. Mole commenced the instant suit on October 17, 1995 by filing her Complaint in the United States District Court for the Eastern District of Missouri. The jurisdiction of the District Court was invoked under the *Americans with Disabilities Act*, 42 U.S.C. § 12101 *et seq.*, under 28 U.S.C. § 1331 and under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of South Carolina and the defendant a corporation authorized to do business in Missouri. Supplemental jurisdiction over her state law claim was invoked under 28 U.S.C. § 1367. In her Complaint, Ms. Mole alleged that Buckhorn failed to reasonably accommodate her and wrongfully terminated her from her employment, despite knowledge of her physical and mental disabilities.

A. Factual Background

Kathleen Mole began working for Buckhorn Rubber Products, Inc., on January 4, 1982 as a temporary clerk/typist in the Sales Customer Service Department at Buckhorn's plant in Hannibal, Missouri. Within a few weeks she became a full-time employee. Ms. Mole remained in the clerk/typist position until February 23, 1987, when she was transferred to Buckhorn's Milford, Ohio facility as a Customer Service Coordinator I. Ms. Mole was

promoted to the position of Customer Service Coordinator II in 1988. Buckhorn moved its Customer Service operation back to Hannibal, Missouri in July, 1990. Ms. Mole was transferred back to Hannibal and given the title of Senior Customer Service Coordinator.

In December, 1992, Ms. Mole began experiencing weakness in her right leg. In the early months of 1993, she began having great difficulty remembering things, developed blurry vision and was nervous and trembling. At about this same time, one of Ms. Mole's co-workers told Buckhorn's Industrial Relations Manager, Ron Meyer, that Ms. Mole was having headaches, dizzy spells and balance problems. Mr. Meyer referred Ms. Mole to a physician with whom he was familiar, Dr. Walid M. Hafez, M.D. Dr. Hafez referred Ms. Mole to a neurologist, Dr. Irving M. Asher, M.D., who diagnosed Ms. Mole on May 18, 1993 as having Multiple Sclerosis and depression. Ms. Mole informed Mr. Meyer of the MS diagnosis. (J.A. 285). Mr. Meyer, in turn, told Buckhorn General Manager Dennis Roberts that Ms. Mole was suspected of having Multiple Sclerosis, and that he would have to find more information about it. (J.A. 260). Shortly after, Mr. Meyer obtained a couple of informational pamphlets on MS and placed them in Ms. Mole's medical file. (J.A. 80, 288). Those pamphlets included suggested accommodations involving little or no cost. (J.A. 88).

Prior to 1991, Ms. Mole received four performance appraisals in which she received positive ratings in all ten of the categories evaluated. Her performance appraisal in December 1991 rated her as effective in six categories and as needing improvement in the remaining four. During the course of 1992, Ms. Mole's supervisors held numerous counseling sessions with her over concerns about her job performance. Concerns over Ms. Mole's job performance continued to be documented up through a June 10, 1994 performance review that recommended she be terminated on the basis that she was making too many mistakes in her work and was unable to provide coverage in the absence of the other customer service coordinator. (J.A. 610-11). Ms. Mole received a notice stating that she was being terminated effective July 14, 1994 and that her last day of work would be June 30, 1994. Ms. Mole met with Buckhorn officials on July 14, 1994 and asked to be accommodated with more rest breaks, days off, full staffing of the customer service department, air conditioning, written instructions and more time to test new medication. Buckhorn declined those requests.

B. Proceedings Below

On motion of the Respondent, the district court entered summary judgment in favor of the Respondent on January 15, 1998. The district court found that a genuine

issue of material fact existed as to whether Ms. Mole is disabled, but that Ms. Mole failed to produce evidence sufficient to create a triable issue as to whether she was qualified, with or without accommodation, to perform the essential functions of her job; and whether her termination gave rise to an inference of unlawful discrimination based on her disability.

Petitioner appealed that judgment to the United States Court of Appeals for the Eighth Circuit. On February 1, 1999, that court affirmed the judgment of the district court. The court of appeals found that Ms. Mole could not show she was a qualified individual with accommodation because: (1) she did not request any accommodation prior to July 14, 1994, the effective date of her termination; (2) Ms. Mole could offer no assurance the requested accommodations would remedy her job performance deficiencies; and (3) some of the requested accommodations were not reasonable. The court of appeals also found that Ms. Mole failed to offer sufficient evidence to show that Buckhorn's stated reasons for Ms. Mole's termination were pretext for unlawful discrimination.

The Honorable Donald P. Lay, Senior Circuit Judge, filed a dissent. Judge Lay disagreed with the majority opinion's use of the *McDonnell Douglas* burden-shifting

analysis.[1] Judge Lay stated that the *McDonnell Douglas* analysis is designed for disparate treatment cases, but that the instant case is a reasonable accommodation claim that requires a different analysis, with the relevant inquiry being whether Buckhorn could or should have reasonably accommodated Ms. Mole's illness. Judge Lay also concluded that material factual disputes remain over whether Buckhorn can reasonably accommodate Ms. Mole.

Petitioner filed a timely Petition for Rehearing with Petition for Rehearing *En Banc*. The court of appeals denied that Petition on March 16, 1999. Judge McMillian voted to grant rehearing.

REASONS FOR GRANTING THE WRIT

Between July 26, 1992 and September 30, 1998, the Equal Employment Opportunity Commission (EEOC) received 108,939 complaints alleging violations of the *Americans with Disabilities Act* (ADA). Office of Research, Information and Planning, EEOC, *Americans with Disabilities Act of 1990 (ADA) Charges FY 1992 - FY 1998* (1998). Of those cases, 31,886 (or 29%) alleged failure to

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[1] *See McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

provide reasonable accommodation. *Id.* The total number of ADA cases filed and the percentage alleging failure to accommodate have remained relatively consistent over the last three fiscal years for which the EEOC has records. *Id.* As many of these cases continue to be litigated in the courts, the question of the proper analytical framework and the proper burdens of proof to be employed will recur. The analytical framework and burdens of proof in those cases are not being applied consistently from circuit to circuit, and in many cases are not being applied in a manner consistent with congressional intent. This Court should give the lower courts and practitioners a clear and consistent standard to ensure that the ADA is enforced in an equal and even-handed manner nationwide.

I. THIS CAUSE PRESENTS THE COURT WITH THE OPPORTUNITY TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS.

As an increasing number of ADA cases have made their way to the circuit courts of appeals, a conflict has emerged as to whether the *McDonnell Douglas* analysis should be used in failure to accommodate cases. Three circuits appear to permit the application of a *McDonnell Douglas* type analysis in such cases. *Mole v. Buckhorn*

Rubber Products, Inc., 165 F.3d 1212, 1216 (8th Cir. 1999) (App., *infra*, A-8); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996); *White v. York International Corp.*, 45 F.3d 357, 361 (10th Cir. 1995). Meanwhile, at least four circuits have found a *McDonnell Douglas* type analysis inappropriate in failure to accommodate claims. *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1288 (D.C. Cir. 1998); *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1286-87 (11th Cir. 1997); *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283-84 (7th Cir. 1996); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996) *see also Prewitt v. United States Postal Service*, 662 F.2d 292, 305 n.19 (5th Cir. Unit A Nov. 1981) (Rehab. Act case). With such an even split among so many circuits, it is unlikely that either approach will gain predominance. An authoritative decision from this Court is the only means of bringing uniformity of decision to this area.

The approach adopted by the latter circuits is more consistent with the language of the ADA and the recognition that disability discrimination is basically different from the types of discrimination barred by Title VII. The *McDonnell Douglas* analysis was created to deal with the difficulty of establishing discriminatory intent through direct evidence. However, when an employer refuses to accommodate the known disabilities of an employee, the employer is taking

the employee's disability into account. The employer is also violating the ADA, unless it can prove one of the defenses provided for in the statute. The focus of the analysis should not be on the employer's intent, but rather on whether the employer could have accommodated the employee's disability, but did not. That issue can be resolved through direct evidence and traditional burdens of proof.

The conflict between the circuits means that cases with similar facts can have very different outcomes depending on where they are filed. In circuits where the *McDonnell Douglas* analysis is used, the focus is shifted away from the employer's ability to reasonably accommodate the employee and instead places the employer's motives at issue. The *McDonnell Douglas* analysis also keeps the burden of persuasion on the employee at all times, including the burden of persuasion on the issue of the employer's ability to make a reasonable accommodation. *See White*, 45 F.3d at 361. In at least some circuits that do not employ a *McDonnell Douglas* analysis for failure to accommodate claims, the burden is placed on the employer to show that a reasonable accommodation is not possible. *Monette*, 90 F.3d at 1182 n.8; *Prewitt*, 662 F.2d at 308.

The Petitioner in the instant case was forced to carry the burden of persuasion that the Respondent could have reasonably accommodated her. If her case had been brought in a circuit where that burden is placed on the employer, a different outcome would have been likely. This Court should grant *certiorari* to resolve the inconsistencies and inequities that result from the different approaches being employed by the various circuit courts of appeals.

II. THIS CAUSE PRESENTS THE COURT WITH THE OPPORTUNITY TO ENSURE THAT THE AMERICANS WITH DISABILITIES ACT IS ENFORCED IN A MANNER CONSISTENT WITH CONGRESSIONAL INTENT.

A. Use of the *McDonnell Douglas* Analysis.

Prior to passing the ADA, Congress considered and rejected proposals to add disability discrimination to Title VII of the Civil Rights Act of 1964. Jeffrey O. Cooper, Comment, *Overcoming Barriers to Employment: The Meaning of Reasonable Accommodation and Undue Hardship in the Americans with Disabilities Act*, 139 U. Pa. L. Rev. 1423, 1427 (1991). Congress instead passed the ADA in recognition of the need for a different approach that

addresses the unique difficulties faced by the disabled. *Id.* If the courts are to enforce the ADA in a manner consistent with congressional intent, they must adopt a form of analysis that recognizes the innate differences between disability discrimination and other forms of discrimination. *See id.* Such an analysis must also take into account the variations between the ADA and Title VII, particularly in their definitions of what constitutes discrimination and in the defenses allowed to employers.

One definition of discrimination that distinguishes the ADA from Title VII is failing to make reasonable accommodation to the known physical or mental impairments of a qualified individual with a disability. 42 U.S.C. § 12112(b)(5)(A) (1994). As discussed in Part I, *supra*, the courts of appeals have been unable to settle on a single analytical framework for evaluating failure to accommodate cases. Those courts that have distinguished cases alleging disparate treatment from those alleging failure to accommodate have found the *McDonnell Douglas* burden shifting approach to be inappropriate for the latter types of cases. *Aka*, 156 F.3d at 1288; *Bultemeyer*, 100 F.3d at 1283-84. That finding is fully supported by the EEOC regulations implementing the ADA.

Those regulations recognize three different types of ADA claims — disparate treatment, disparate impact and

not making a reasonable accommodation. 29 C.F.R. § 1630.15 (1998). The regulations also outline the defenses applicable to each type of claim. *Id.* The defenses available in the *McDonnell Douglas* burden shifting analysis used in Title VII cases are specifically referenced as potentially being applicable to ADA disparate treatment cases. 29 C.F.R. Part 1630, App., p. 365 (1998). By contrast, the regulations do not mention *McDonnell Douglas* as being applicable to failure to accommodate cases, but instead talk about the "undue hardship" defense as being appropriate to those kinds of cases. *Id.* at 366. The regulations also point out that the employer bears the burden of presenting evidence and showing that an accommodation would impose an undue hardship. *Id.* The EEOC has thus recognized the innate difference between failure to accommodate claims and other types of discrimination, and that a different method of proof is required.

By using a *McDonnell Douglas* type approach in the instant case, the court of appeals failed to recognize that distinction. As this Court has noted, the EEOC's guidelines "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). This Court should grant *certiorari* to examine whether the experience and informed judgment reflected

in the EEOC guidelines calls for a different approach than that taken by the court of appeals.

B. Burden of Showing that a Reasonable Accommodation is Possible.

Title I of the ADA is to be enforced in a manner consistent with the *Rehabilitation Act of 1973.* 42 U.S.C. § 12117(b) (1994). In passing the ADA, the House Committee on Education and Labor stated that it intended that the burden of proof under the ADA be construed in the same manner as Section 504 of the Rehabilitation Act of 1973. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 345 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 354.

A basic evidentiary framework for Rehabilitation Act cases involving reasonable accommodation was first established by the United States Circuit Court of Appeals for the Fifth Circuit and has been followed with relative consistency by other federal courts. Robert L. Burgdorf, Jr., *Disability Discrimination in Employment Law* 322 (1995) *citing Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. Unit A Nov. 1981). Under that framework, as part of the plaintiff's prima facie case there must be a facial showing, or at least a plausible reason to believe that the disability can be accommodated to permit the plaintiff to perform the essential functions of the job. Burgdorf, *supra*,

at 322. If the employer presents credible evidence suggesting that accommodation is not reasonably possible, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. *Id.* at 323. The defendant bears the ultimate burden of persuading the court that it accommodated the plaintiff, that no reasonable accommodation is possible, or that accommodation would pose an undue hardship. *Id.*

The instant case, and several other cases analyzing failure to accommodate claims under the ADA, have ignored Congress' mandate and have imposed standards inconsistent with the Rehabilitation Act. Plaintiffs bringing reasonable accommodation cases before those courts are being forced to make more than a facial showing that a reasonable accommodation is possible, and are being forced to bear the burden of persuasion on whether their employer can accommodate them. *See, e.g., Stewart*, 117 F.3d at 1286; *White*, 45 F.3d at 361. Within the Eighth Circuit, the burden of persuasion differs depending on whether the case was brought under the ADA or under the Rehabilitation Act. *Compare Mole*, 165 F.3d at 1218 (ADA case) (App., *infra*, A-12) *with Wood v. Omaha School Dist.*, 985 F.2d 437, 439 (8th Cir. 1993) (Rehab. Act case).

The analysis used by the court of appeals in the instant case did not require the Respondent to produce evidence, much less prove that it was unable to reasonably accommodate the Petitioner. The court of appeals instead made the Petitioner's burden of producing rebuttal evidence into a burden of persuasion. By focusing on the timing of Petitioner's request for accommodation, the Petitioner was forced to make more than a facial showing that accommodation was possible. This form of analysis threatens the effectiveness of a private action under the ADA to enforce public policy by imposing a burden on plaintiffs that was not contemplated by the drafters of the ADA. This Court should grant *certiorari* to ensure that the ADA is enforced consistent with congressional intent.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 98-1500

Kathleen Mole,	*
	*
Plaintiff - Appellant,	*
	* Appeal from the
v.	* United States
	* District Court
Buckhorn Rubber Products,	* for the
Inc.,	* Eastern District
	* of Missouri.
Defendant - Appellee.	*

Submitted: September 22, 1998
Filed: February 1, 1999

Before BEAM, LAY, and Loken Circuit Judges.

Loken, Circuit Judge.

Kathleen Mole commenced this action alleging that Buckhorn Rubber Products, Inc. ("Buckhorn"), violated the Americans with Disabilities Act, 42 U. S. C. § § 12101-12213 ("'ADA"), and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.055. 1(1) ("MHRA"), when it fired her for persistent poor job performance despite knowledge of her disabilities, multiple sclerosis ("MS") and severe depression. The district court[2] granted summary judgment dismissing these claims, concluding Mole failed to present sufficient evidence to establish two elements of a prima facie case of disability discrimination or a triable issue of pretext. Mole appeals. We review the grant of summary judgment de novo, viewing the record in the light most favorable to Mole, the non-moving party. See Aucutt v. Six Flags Over Mid-America, Inc., 85 F.3d 1311, 1315 (8th Cir. 1996). We affirm.

Buckhorn hired Mole in 1982 as a clerk/typist in Hannibal, Missouri. In 1987, she was promoted to customer service coordinator and transferred with the Sales Customer Service Department to Ohio, where she later received another promotion. In 1990, Buckhorn relocated the Sales Customer Service Department back to the Hannibal facility, promoting Mole to senior customer service coordinator. Mole received

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[2] The HONORABLE GEORGE F. GUNN, JR., United States District Judge for the Eastern District of Missouri, who to our great regret has died since completing his work on this case.

excellent job performance reviews throughout this period.

Mole Develops Job Performance Problems. David Johnston became Mole's supervisor in April 1991. In her December 1991 written Performance Appraisal, Johnston rated Mole as "needing improvement" in four of ten performance categories, criticizing her for a negative attitude towards customers and for failing to provide leadership and direction to fellow employees. Mole rated her own performance as good, considering the division was short-staffed, but acknowledged that she needed to "handle stress better." Johnston met with Mole numerous times in 1992, sometimes in the company of Ronald Meyer, Buckhorn's industrial relations manager, to comment on her unsatisfactory performance. In late 1992, Johnston sent Mole a memo in which he noted "key mistakes in the past few months," criticized her failure to follow instructions, and warned her that a failure to improve could result in "appropriate disciplinary action." In early 1993, Buckhorn transferred some important customer accounts from Mole to the other customer service coordinator, Angela Dillman. Dillman testified that she discovered errors and heard customer complaints after taking over some of Mole's accounts. Buckhorn's receptionist testified that she received complaints from customers who asked to be transferred to someone other than Mole.

In June 1993, Johnston authored another written performance review, rating Mole as "needing improvement" in six categories, "marginal" in two, and "effective" in two. Johnston noted that Mole resisted change in the department, had a negative attitude with customers, and made errors. After stating that Mole was being demoted to customer service coordinator, the review concluded:

> Kathy has been ill during the past eighteen months, and the extent to which her illness has contributed to her poor performance is not easily gauged. The timing of this review is such that Kathy has just returned to work from her illness. If her performance should significantly improve in the months following her return from this illness, I will gladly review her again in six to nine months.

Johnston prepared another written performance review in December 1993, rating Mole as "needing improvement" in six and "marginal" in four categories, and noting that she continued to have problems with lack of motivation, disorganized work space, and customer relations. Meyer added a handwritten comment at the end of this document: "Within the next 6 months we will determine whether Kathy will remain in her Customer Service position. Her performance must substantially improve immediately." Mole's written self-assessment stated that she had done the job to the best of her ability and

commented, "I do not feel my having M/S should be held against me."

On February 10, 1994, Johnston met with Mole and delivered a memorandum detailing five instances of significant customer order errors and concluding: "In your last review you were told that you would have to improve in all aspects of the job, and to date I have not noted any such improvement. Continued lack of improvement will lead to termination."

Mole Develops MS and Depression. In April 1993, Mole began experiencing difficulty with her balance, memory, vision, and a weakened right leg. In early May, Meyer learned that Mole was suffering from headaches and dizziness. He referred her to a medical specialist and, when an initial appointment suggested a need for further testing, placed her on paid sick leave for that purpose. After Dr. Irving Asher diagnosed Mole as, having MS, Buckhorn placed her on paid sick leave for over two weeks, and she was hospitalized and treated with steroids and anti-depressant medication. In June 1993, Dr. Asher examined Mole again and suggested she rest at home for two weeks to alleviate her heat sensitivity and fatigue. Buckhorn granted this request. Mole's depression fluctuated between August and October, while her physical condition remained stable until November, when she was again hospitalized.

On December 15, Johnston met with Mole to discuss her health and "glean an understanding of her condition." Mole said she was feeling fine and confirmed that her doctor had approved her return to work. She was nervous and cried through much of the meeting, particularly when her handling of customers was criticized. Mole returned to work but suffered a seizure on December 17 and was again hospitalized. Her physical condition had improved by early January 1994, and in March she had a "normal" exam, following which Dr. Asher called Meyer at Buckhorn and found him "very supportive." Meyer stated that Mole had "improved over the course of her treatment" and suggested another leave of absence, if needed. Dr. Asher did not suggest and Mole did not request a leave of absence.

Mole Is Terminated. On June 10, 1994, Johnston authored a Performance Update. He stated that Mole "is putting forth her very best effort to improve her performance [but] this improvement is inadequate." After outlining several costly customer order errors, Johnston recommended that Mole be terminated. On June 30, Johnston and Meyer met with Mole and delivered a two-week notice of termination. The notice advised, "The date of your termination will be July 14, 1994, and the last day of active employment will be today, June 30, 1994." That same day, Buckhorn's general manager sent Mole a letter explaining "the different insurance benefits and welfare plans you could be eligible for if you would need to go on to total

disability." Mole met with Buckhorn officials on July 14. She asked to be accommodated with rest breaks, days off, and the addition of a third customer service coordinator. She presented a July 11 memorandum from Dr. Asher stating:

> Ms. Mole has multiple sclerosis. I believe her inability to function adequately at work has been due to her illness. Multiple sclerosis will be a lifelong illness for her and will likely fluctuate considerably.

Buckhorn declined to reinstate her.

Mole commenced this action in October 1995, alleging that Buckhorn violated the ADA and the MHRA by refusing to accommodate her disability and terminating her. The ADA prohibits covered employers, such as Buckhorn, from "discriminat[ing] against a qualified individual with a disability because of the disability." 42 U.S.C. § 12112 (a). A qualified individual with a disability is one "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. § 12111(8). Disability discrimination is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A).

To establish a prima facie case of disability discrimination under the ADA, Mole must show that at the time in question she was disabled, was qualified to perform the essential functions of her job with or without reasonable accommodation, and was terminated under circumstances that raise an inference of unlawful disability discrimination. See Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir.), cert. denied, 117 S. Ct. 274 (1996). The same analysis applies to claims under the MHRA. See Mathews v. Trilogy Communications, Inc., 143 F.3d 1160, 1164 n.5 (8th Cir. 1998).

The district court concluded that Mole failed to establish the second and third prongs of her prima facie case.[3] She was not qualified to perform the essential functions of her job, the court explained, because "her problems in the position since 1991 were well-documented and affected the essential functions of the job," she "does not dispute that she made the errors or the significance of those errors," she "did not provide

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[3] On appeal, the parties debate whether Mole has a "disability" as defined in the ADA and therefore satisfied the first prong of her prima facie case. The district court concluded that this was a genuine issue of material fact, and we need not consider it. For the resolution of this issue in other ADA cases involving plaintiffs suffering from MS, see Moritz v. Frontier Airlines, Inc., 147 F. 3d 784, 786 (8th Cir. 1998); Leffel v. Fin. Servs., 113 F. 3d 787, 792 (7th Cir.), cert. denied, 118 S.Ct. 416 (1997); and Kocsis v. Multi-Care Mgmt., Inc., 884-85 (6th Cir. 1996).

in a timely manner any suggested accommodations that would have cured the problems," and some of the accommodations she requested after termination were unreasonable. Mole's discharge did not give rise to an inference of disability discrimination, the court concluded, because her negative performance reviews began before Buckhorn knew she had MS and her assertion that Buckhorn fired her to reduce the self-insured costs of future MS treatment was sheer speculation. Alternatively, the court concluded that even if Mole established a prima facie case of disability discrimination, Buckhorn offered a legitimate reason for termination, her poor job performance, and Mole presented insufficient evidence of pretext. After careful review, we agree with this assessment of the summary judgment record.

Qualified Individual with a Disability. To be a "qualified individual" entitled to ADA protection, "a plaintiff must show that [her] work performance met the employer's legitimate job expectations," with or without reasonable accommodation. Wilking v. County of Ramsey, 153 F.3d 869, 873 (8th Cir. 1998) (quotation omitted). It is undisputed that Mole had the necessary experience and training for the position of customer service representative, and performed more than adequately in that position for many years. However, Buckhorn documented serious performance deficiencies beginning in 1991 and Mole's failure to meet repeated demands for improved performance from 1992 until she was terminated in June 1994.

An ADA plaintiff may not rely upon past performance to establish that she is a qualified individual without accommodation when the employer has produced undisputed evidence of diminished or deteriorated abilities.

Mole argues Buckhorn failed to define the essential functions of her position. See Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1113 (8th Cir. 1995). On the facts of this case, the contention is without merit. It is undisputed that the key responsibilities of a customer service coordinator were to take and enter orders accurately, and to respond to customer inquiries and complaints. Buckhorn documented Mole's order inaccuracies and poor customer relations over an extended period of time. While admitting these deficiencies, Mole argues they were minor, citing testimony by co-workers and one customer expressing positive opinions about her job performance. However, these persons had much more limited contact with Mole and her work than Johnston, Meyer, and Dillman. Mole bears the ultimate burden of proof on this issue, See Benson, 62 F.3d at 1113, and "consideration shall be given to the employer's judgment as to what functions of the job are essential." 42 U.S.C. § 12111(8). We agree with the district court that Mole failed to establish that she could perform her essential job functions without accommodation.

That leaves the question whether Mole presented sufficient evidence that she would have been a qualified

individual if Buckhorn had reasonably accommodated her disabilities. Mole concedes that Buckhorn helped her seek medical treatment, granted her leaves of absences for diagnosis and treatment of MS and depression, allowed her time off and br[illegible]when she returned to work, and distributed some of her work to other employees. Dr. Asher testified these were reasonable accommodations for an employee with MS. But Mole argues Buckhorn knew or should have known how to afford her further accommodations.

As the district court recognized, the problem with this contention is that prior to receiving a notice of termination Mole never advised Buckhorn she needed additional accommodation, much less what accommodation specific to her position and workplace was needed. "In general, it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed." Wallin v. Minnesota Dept. of Corrections, 153 F.3d 681, 689 (8th Cir. 1998) (quotation omitted); see Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago, 104 F.3d 1004, 1013 (7th Cir. 1997); Taylor v. Principal Fin. Group., Inc., 93 F.3d 155, 164-65 (5th Cir.), cert. denied , 117 S. Ct. 586 (1996). It is undisputed that between May 1993 and June 1994 Buckhorn was aware of and accommodated Mole's medical problems. There is no evidence Buckhorn failed to make a good faith reasonable effort to help Mole determine if other accommodations might be needed. See Beck v. University of

Wisconsin Bd. of Regents, 75 F.3d 1130, 1135 (7th Cir. 1996). Mole argues Buckhorn should have learned more about accommodating MS by consulting informational pamphlets and discussing her condition with her doctors. But it is undisputed that Buckhorn had the pamphlets and discussed her condition with Dr. Asher. Only Mole could accurately identify the need for accommodations specific to her job and workplace. Mole cannot "expect the employer to read [her] mind and know [she] secretly wanted a particular accommodation and [then] sue the employer for not providing it." Ferry v. Roosevelt Bank, 883 F. Supp. 435, 441 (E.D. Mo. 1995) (quotation omitted).

Mole also argues that she requested specific accommodations on July 14, 1994, the effective date of her termination -- more breaks, fully staffing the department, air conditioning, written instructions, and more time to test new medication. Given the timing of the meeting, this was a request for reinstatement, not a timely request for on the-job accommodations. Moreover, Mole could offer no assurance the requested accommodations would remedy her many job performance deficiencies. Indeed, Mole accompanied these requests with a letter from Dr. Asher warning that she has a lifelong illness that "will likely fluctuate considerably." Finally, we agree with the district court that some of the requests were not reasonable. An employer is not required to hire additional employees or redistribute essential functions to other employees. See Moritz, 147 F.3d at 788 (8th Cir. 1998). Thus, the

ADA does not require an employer "to change the essential nature of the job" in order to accommodate the personality and emotional deficiencies that may result from MS and depression. Boelman v. Manson State Bank, 522 NW.2d 73, 81 (Iowa 1994).

On this record, we agree with the district court that Mole failed to present sufficient evidence she could meet Buckhorn's legitimate job expectations with or without reasonable accommodation of her alleged disabilities. Compare Wilking, 153 F.3d at 873. Accordingly, summary judgment was appropriate.

Other Grounds for Summary Judgment. To satisfy the third prong of her prima facie case, Mole must present sufficient evidence that the circumstances of her discharge give rise to an inference of unlawful disability discrimination. In addition, even if Mole presented sufficient proof of a prima facie case, to avoid summary judgment she must demonstrate that Buckhorn's legitimate reason for her discharge was pretextual, that "a discriminatory animus lies behind [its] neutral explanations." Wilking, 153 F.3d at 874. To show pretext, Mole must offer sufficient evidence for a reasonable trier of fact to infer intentional discrimination. See Christopher v. Adam's Mark Hotels, 137 F.3d 1069, 1073 (8th Cir.), cert. denied, 119 S. Ct. 62 (1998). We agree with the district court that Mole failed to meet these evidentiary burdens.

It is undisputed that Mole's poor job performance evaluations started long before Buckhorn knew she had MS and continued for more than a year after the initial diagnosis. Mole conceded she developed these performance problems and presented no evidence that her performance rose to an acceptable level by June 1994. Mole's contention "that the infractions were not serious enough to warrant a discharge ... merely questions the soundness of defendant's judgment, and does not demonstrate pretext for discrimination." Wilking, 153 F.3d at 874 (quotation omitted). Supporting affidavits from fellow employees who did not deal with Mole on a systematic basis are insufficient to counter Buckhorn's proof she was discharged because she did not meet its legitimate expectations. See Leffel, 113 F.3d at 791, 795-96. Finally, as the district court noted, Mole's contention that Buckhorn fired her to escape the high medical costs of treating her MS is totally unsupported. Thus, the record will not support an inference that her discharge was "based upon her perceived disability rather than upon actual shortcomings in her work." Leffel, 113 F.3d at 795.[4]

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[4] Mole also argues that discharging her for performance deficiencies that were symptoms of her MS – lack of motivation, data entry errors, and rudeness to customers – is as unlawful as discharging her because of that disability. We disagree. Firing an employee because of the job performance consequences of a disability such as MS, rather than the disability itself, it not actionable under the ADA. See Matthews v. Commonwealth Edison Co., 128 F.3d 1194, 1196, 1198 (7th Cir. 1997);

For the foregoing reasons, the judgment of the district court is AFFIRMED.

LAY, Circuit Judge, dissenting.

My basic disagreement with the trial court is in the application of the McDonnell Douglas burden-shifting analysis to the facts of this case. See McDonnell Douglas Corp. v. Green , 411 U.S. 792, 93 S. Ct. 1817 (1973). The majority opinion, without directly referencing McDonnell Douglas, applies the same burden-shifting analysis. Although our cases have given lip service to the McDonnell Douglas method of analysis in ADA cases, under the facts of this case it is unnecessary and inappropriate. The McDonnell Douglas analysis is designed to govern disparate treatment cases. The ultimate question served by such analysis is that of disparate treatment of the claimant with others similarly situated. This case, however, does not involve a disparate treatment claim, but rather a reasonable accommodation claim that should be analyzed differently.[1]

Mararri v. WCI Steel, Inc., 130 F.3d 1180, 1182-83 (6th Cir. 1997).

[1] If a claimant under the ADA were making a claim of disparate treatment, such as an employer placing a greater burden on disabled workers than on other employees, then such disparate treatment analysis would apply. Cf. Matthews v. Commonwealth Edison C., 128 F.3d 1194 (7th Cir. 1997). However, no such claim is made here.

The ADA is statutorily defined and driven. An employer may not "discriminate" against "a qualified individual with a disability because of the disability . . . ." 42 U.S.C. § 12112(a). Discrimination as defined has nothing to do with the claimant's disparate treatment. The ADA defines the term "discriminate" as follows:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the employer]; or
>
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of [the employer] to make a reasonable accommodation to the physical or mental impairments of the employee or applicant.

42 U.S.C. § 12112(b)(5)(A)-(B).

In most ADA cases, as here, a single question becomes the focus of the inquiry: whether the employer should have reasonably accommodated the employee's disability but did

not.[2] In such cases, the McDonnell Douglas disparate treatment analysis is inappropriate. See Bultemeyer v. Fort Wayne Community Schs., 100 F.3d 1281, 1283-84 (7th Cir. 1996); see also Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (stating that once the plaintiff makes a facial showing that reasonable accommodation is possible, the burden of production shifts to the employer to show that it is unable to accommodate the employee); Wood v. Omaha Sch. Dist., 985 F.2d 437, 439 (8th Cir. 1993) (stating that under the Rehabilitation Act a plaintiff need only make a facial showing that reasonable accommodation is possible and finding that the plaintiff met that burden by proposing certain accommodations); Arneson v. Heckler, 879 F.2d 393, 396 (8th Cir. 1989) (reversing dismissal of Rehabilitation Act claim because the plaintiff was "only required to provide evidence sufficient to make 'at least a facial showing that reasonable accommodation is possible'" before the burden shifts to the employer to prove it is unable to make the accommodation)

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[2] The district court holds there is a question of fact as to whether the plaintiff is disabled. The majority avoids the issue. This totally ignores the record. There is no question that the plaintiff suffers from multiple sclerosis and has manifested the symptoms of that dreaded disease. There is no refutation that her physicians have certified that she suffered depression, loss of motivation, lack of concentration, cognitive dysfunction, among other disabling symptoms which are inherent in that disease.

(citation omitted).[3] Thus, it should be clear the McDonnell Douglas method of proof is irrelevant in this case.[4] There is no question according to Mole's physicians that she suffers from MS and that her symptoms affected her job performance.[5] The

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[3] Rehabilitation Act cases are relevant in analyzing the ADA "because the ADA specifically mandates that its provisions be interpreted or conflicting standards for the same requirements under [the ADA] and the Rehabilitation Act of 1973." Benson, 62 F.3d at 1112 n.2.

[4] The majority's dominant concern with the burden-shifting analysis probably resulted from the plaintiff's assertion that the Buckhorn termination was pretextual in kind. Notwithstanding, a court should not be mislead by a party's irrelevant argument of incorrect legal principles involved in any case. Here the issue of pretextuality was a nonissue simply because plaintiff did not rest her claim upon a basis of disparate treatment. The mere fact that she argues it demonstrates only that her counsel confused the application of the burden-shifting analysis of McDonnell Douglas to a case of discrimination under the ADA. In doing so, however, the court walks down the wrong path of analysis by finding no factual proof of pretextuality within the record. Once again, it should be clear that pretextuality cannot be an issue in a case brought under the ADA where the statutory basis of discrimination relates to the defendant's failure to provide reasonable accommodation. It should be obvious that whether the claim of pretextuality is factually controverted is immaterial. This question is totally subsumed in the determination of whether the employer provided reasonable accommodation to a qualified person's needs under the ADA.

[5] Mole claims that even without accommodation she was able to carry on her job at a satisfactory level. Mole supports her claim with

relevant inquiry then becomes whether Buckhorn could or should have reasonably accommodated Mole's illness.

Under the present record, the reasonableness of the extent of Buckhorn's accommodation should be a question for the trier of fact. See Wood, 985 F.2d at 439-440; see also Arneson v. Heckler, 879 F.2d 393 (8th Cir. 1989) (J. Beam).[6] Material factual disputes remain concerning whether Buckhorn can reasonably accommodate Mole. The record is replete with additional accommodations Mole contends Buckhorn could have made. The National Multiple Sclerosis Society's information materials, which Buckhorn admittedly possessed, list several accommodations which could be made to assist an employee with MS.[7] Dr. Asher also listed several possible

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affidavits from co-workers and customers who dealt with her and found her work satisfactory. Judge Loken rejects Mole's claim by observing: "Supporting affidavits from fellow employees who did not deal with Mole on a systematic basis are insufficient to counter Buckhorn's proof she was discharged because she did not meet its legitimate expectations." At the very least, however, this is an issue that a trier of fact should decide.

[6] In Arneson, Judge Beam noted a possible accommodation to a disabled employee was to furnish "a clerical assistant" or transfer. Yet, Judge Loken found Mole's requests to have Buckhorn return to its previous three-person staffing of the customer service department to be unreasonable.

[7] The Multiple Sclerosis Society's brochure offered the following suggested accommodations, noting that "[r]easonable accommodations

accommodations in his deposition testimony.[8]

However, the district court and now the majority emphasize that Mole cannot overcome the defendant's motion

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can include changes in work schedules, job duties, workplace environment and employer attitudes:

> *Energy Saving*: rest period; flexible working hours (to avoid rush hour traffic, etc); parking space close to entrance; office location close to rest room; communication system allowing use of intercom instead of walking.
>
> *Environmental Control*: air conditioning, good lighting.
>
> *Accessibility*: ramps, wide doors, adaptable work station arrangements, grab bars in bathrooms.
>
> *Job Modifications*: trading nonessential duties for other tasks which do not conflict with functional limitations.
>
> *Technological adaptions and devices*: may have some cost attached but also may be provided by outside sources.

[8] Dr. Asher testified that necessary accommodations would change from time to time due to the disease, but would include the following: (1) permitting leaves of absence for medical treatment and follow-up; (2) allowing rest breaks during the day to regain energy; (3) limiting hours of work; (4) permitting the use of medication; (5) providing an air-conditioned workplace; and (6) giving written instructions to overcome memory deficits caused by the disease.

for summary judgment because she failed to make requests for accommodations in a timely manner. Such a defense does not logically or factually exist upon a fair review of the record. The record shows that Mole made requests for accommodation during a meeting held on July 14, 1994, the effective date of her termination. Mole requested rest breaks, some days off, time for her doctors to determine the proper prescriptions and dosages to manage her illness,[9] and fully staffing the customer service department. She also submitted a note to Buckhorn from Dr. Asher stating that her MS was causing her work problems. Unfortunately, this court feels her requests came too late because she made them after she was terminated. The record reveals, however, that Mole made her requests and submitted her physician's letter the very same day that her termination was to take effect.[10] Considering the human

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[9] Approximately a month before Mole was terminated, her doctors prescribed a new medication, Betaseron, to treat her illness. Mole's doctors testified that it would take some time to determine the therapeutic effect the Betaseron would have on Mole's symptoms. The record indicates that Mole told Buckhorn representatives during the July 14, 1994, meeting that it would take time for her doctors to establish the appropriate prescriptions and dosages to treat her illness.

[10] Although Mole's last day of active employment was on June 30, 1994, the date on which Buckhorn gave Mole a two-week notice of termination, the notice expressly stated that "the date of [Mole's] termination will be July 14, 1994." Arguably, Mole was still employed by Buckhorn until the end of the day on July 14, 1994.

concerns involved here, it is difficult to accept the majority opinion's myopic view of the record. "A few hours' tardiness should not be the reason for cutting off the interactive process and cutting off a person's rights under the ADA." Bultemeyer, 100 F.3d at 1286. Mole's delay was not lengthy or inexcusable. After Mole requested accommodation on July 14, 1994, and presented her physician's letter, Buckhorn could have reconsidered its decision to terminate Mole and could have then included Mole and Dr. Asher in discussions regarding reasonable accommodations. See id. Instead, Buckhorn's officials refused to provide Mole any further accommodation.

Even assuming we cannot credit Mole's testimony that she requested accommodation (albeit on summary judgment), or if we accept the majority's finding that Mole's requests came too late, the record shows that Buckhorn knew accommodation alternatives were available prior to its termination of Mole. Buckhorn was in direct contact with Mole's physicians prior to July 14, 1994. Buckhorn knew Mole suffered from multiple sclerosis, and Buckhorn possessed informational brochures that specified possible accommodations such as, "changes in work schedules, job duties, workplace environment and employer attitude(s)." To suggest that Buckhorn was not alerted to the need for reasonable accommodations ignores the historical facts. Buckhorn had conversations with Mole before her termination regarding accommodations, and Buckhorn had in fact provided some accommodations to her. However, as

Mole argues, Buckhorn "runs away from its own lawful duties under 29 C.F.R. § 1630.2(o)(3)[11] to initiate an 'interactive process' and affirmatively find out what will work."

This court on prior occasions has stated that summary judgment should be used only in rare instances in employment discrimination cases. See Davis v. Fleming Cos., Inc., 55 F.3d 1369, 1371 (8th Cir. 1995); Oldham v. West, 47 F.3d 985, 988 (8th Cir. 1995); Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). This admonition certainly applies to cases arising under the ADA. Today we simply give lip service to our earlier admonition. A fair reading of the record and the correct application of the proper standards require a different result.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[11] 29 C.F.R. § 1630.2(o)(3) reads:

To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome these limitations.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KATHLEEN MOLE,	)	
	)	
Plaintiff(s),	)	
vs.	)	**Case No. 4:95CV01955GFG**
	)	
BUCKHORN RUBBER	)	
PRODUCTS, et al.,	)	
	)	
Defendant(s).	)	

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion for summary judgment. (Doc. 32) Plaintiff opposes the motion. (Doc. 42)

Kathleen Mole filed this action against Buckhorn Rubber Products, Inc., alleging that they discriminated against her based on her disability, in violation of the Americans with Disabilities Act (ADA) , 42 U.S.C. § 12101 et seq. (Count I) and the Missouri Human Rights Act (MHRA) , Mo. Rev. Stat. § 213. 055. 1 (1) (Count II).

I. Facts

Mole was hired to work for Buckhorn at its Hannibal, Missouri facility in 1982 as a temporary clerk/typist, and she became a full-time employee within a few weeks. She remained in that position until 1987. The record includes positive performance appraisals for plaintiff from 1983 and 1986. In 1987, plaintiff was transferred to defendant's Milford, Ohio facility to work as a Customer Service Coordinator I. In 1988 she was promoted to Customer Service Coordinator II. Mole received positive performance appraisals in January and December 1989. In the December 1989 evaluation, Mole was rated "effective" in seven of ten categories, "effective+" in one category, and "excellent" in two categories. On July 1, 1990, the Customer Service function was transferred to the Hannibal facility, and plaintiff was transferred back to Hannibal and was given the title Senior Customer Service Coordinator.

As a Customer Service Coordinator, plaintiff's responsibilities included communicating with customers on the telephone and providing them with product information; receiving, addressing, and responding to customer complaints; satisfying customer requests for order follow-up and expediting of product shipments; receiving and processing customer order information; and preparing and entering customer order information into the computer system. As the senior coordinator, Mole was responsible for answering any questions

that the other customer service coordinators might have.

In April 1991, David Johnston became the supervisor of the customer service department. Johnston attested that he met several times with plaintiff over the course of 1991, advising her that her performance needed to improve in certain areas. In December 1991 Mole had a performance appraisal in which she was rated "effective" in six of ten categories and "needs improvement" in four of ten categories. The evaluation characterized Mole as "a fine employee," but also stated that her work area was cluttered, she needed to assume more of a leadership role, she tended to get angry at the demands placed by customers, and she needed to improve her telephone skills. Johnston attested that he met several times with plaintiff during 1992 to discuss her performance. Ronald Meyer, the industrial relations manager, testified that he attended several of those meetings. On October 30, 1992, Johnston and Meyer met with plaintiff and issued her a written warning that lack of improvement in her performance would result in disciplinary action. The warning stated that she had made "a number of key mistakes" in the past few months, that directives had been ignored, and that customers were handled in a negative and unprofessional manner.

In May 1993, another employee informed Meyer that Mole was experiencing "headaches, dizzy spells, and some balance problems." Meyer referred her to a specialist, Dr. Hafez.

Plaintiff related to Dr. Hafez that she had been having weakness in her right leg since December 1992, "great difficulty remembering things" for a couple of months, recently developed blurry vision, nervousness and trembling. Dr. Hafez indicated that Mole possibly had multiple sclerosis (MS) and ordered further tests. Plaintiff informed Meyer that she had symptoms of MS, and she was placed on paid sick leave for the tests May 6-14, 1993. Dr. Hafez referred Mole to another doctor, Dr. Asher. Mole returned to work on May 17. On May 18 Dr. Asher evaluated Mole and noted weakness of the right leg, difficulty walking, difficulty with bladder and bowel function, blurred vision, dizziness, difficulty sleeping, and depression. Dr. Asher diagnosed Mole with MS, probably symptomatic as early as December 1992. Dr. Asher ordered her hospitalized, and she was again placed on paid sick leave from May 18 through June 1, 1993. Defendant hired a temporary employee through Manpower Temporary Services to assume part of plaintiff's duties during her absence. The temporary employee was retained to assist with clerical duties after Mole returned.

In early 1993, defendant reassigned accounts, giving some of the more time-consuming accounts to the other customer service coordinator, Angela Dillman. Dillman testified in her deposition that there were problems with some of the accounts that were transferred to her from Mole, that she received complaints from customers that Mole had been rude to them, and that when Mole was absent and Dillman had to take

over her accounts, Dillman found a large stack of papers containing information that was supposed to be distributed throughout the company but was not. Some of the information dated back to before Mole returned to Hannibal, and scheduling and customer problems were caused by Mole's actions. Dillman also testified that Mole was uncomfortable using the new computer system and incorrectly entered orders. Donna Roberts, defendant's receptionist, testified that several times in Mole's last year of employment customers complained to her that Mole had been rude to them and they did not want to speak with her. Beverly Bareis, defendant's credit collection manager, testified that in the course of her job she found more errors created by Mole than by other customer service coordinators. Meyer testified that Mole would often sit at her desk crying.

Mole submitted the deposition testimony of Allice King, the document control clerk for the engineering department, who testified that Mole did not commit more than the normal errors and that she was "shocked" when Mole was discharged. Mole also submitted the deposition testimony of Joe Houser, a market sales representative, who testified regarding an error Mole had made and also testified that he did not receive any customer complaints about Mole. Mole submitted an affidavit from a customer who indicated that he preferred dealing with Mole to other customer service representatives.

In June 1993, Mole felt ill at work. At Mole's request,

Ronald Meyer telephoned Dr. Asher and explained that he would grant plaintiff a leave of absence if that would benefit her. Dr. Asher examined plaintiff and recommended that she take a two-week leave of absence. Plaintiff took a paid leave of absence from June 23 to July 12, 1993. On June 28, while she was on sick leave, plaintiff received a performance appraisal that rated her as "effective" in two of ten categories, "needs improvement" in six categories, and "marginal" in two categories. The evaluation noted that she was resistant to changes in the department, needed to develop a more positive attitude with customers, maintained a disorganized work area, and needed to eliminate errors. Mole was demoted from her position as the senior coordinator on July 1, 1993.

On November 11, Dr. Asher noted that Mole "has been having increasing difficulty walking for the past 2 weeks and she has become basically afunctional. She is sitting around at home crying. Complains of difficulty with her vision. She is not eating and she is not sleeping." She was again hospitalized and was on paid sick leave November 10 to December 7, 1993. On December 7, Dr. Asher noted improvement, but on December 17 she suffered a seizure, was again hospitalized, and was on sick leave until December 23, 1993. In a performance appraisal dated January 1, 1994, Mole was rated as "needs improvement" in six of ten categories and "marginal" in four. The appraisal noted a lack of improvement and wide mood swings that "may be attributable to her medical condition." It also noted that

plaintiff mistakenly believed that she was doing "fine," and that she needed to improve substantially to remain in her position. On February 10, 1994, Johnston met with plaintiff to discuss her performance and presented her with a memorandum detailing problems with her performance. The memorandum stated that continued lack of improvement would lead to her termination. Dr. Asher noted an improvement in plaintiff's condition in appointments in January and March 1994. After an appointment on March 7, Dr. Asher noted that he had spoken with Meyer, who had noticed "marked improvement" in plaintiff, had indicated he would try to support her, and had indicated that additional time off would not be a problem.

On June 10, 1994, Johnston prepared a performance update stating that plaintiff was "putting forth her very best effort to improve her performance," noting more positive dealings with customers and coworkers and good attendance, but stating that the improvement was inadequate. The memorandum listed examples of errors that plaintiff continued to make, including three instances in which plaintiff did not cancel orders or incorrectly entered orders that had to then be returned at company expense and caused others to redo her work. The memorandum stated that Mole could not properly cover the department in the absence of Dillman, which was not true of Dillman in Mole's absence, and stated that Mole did not understand the importance of doing her job well. The memorandum recommended that plaintiff be terminated.

Plaintiff was terminated on June 30, and was paid through July 14, 1994. Plaintiff was given a second option of applying for long-term disability benefits. On July 14, plaintiff met with Meyer and advised him that she wanted her job back. She presented a letter from Dr. Asher which stated that "Ms. Mole has multiple sclerosis. I believe her inability to function adequately at work has been due to her illness. Multiple sclerosis will be a lifelong illness for her and will likely fluctuate considerably." Plaintiff asserts that she requested accommodation during her meeting with Meyer by suggesting to defendant that she would need to take rest breaks and some days off, and that defendant should fully staff the customer service positions by hiring a third customer service coordinator. Defendant refused to give plaintiff her job back.

Meyer submitted a supplemental affidavit stating that defendant employed three customer service coordinators during the initial period that the department was transferred to the Hannibal facility, but defendant had determined that the sales volume did not justify three coordinators. Defendant added a third coordinator position in May 1995 to meet the sales demands associated with defendant's waterworks products, which was initiated in 1994.

II. Law

The Eighth Circuit has cautioned that "summary judgment should seldom be granted in employment discrimination cases." Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). Only in rare cases when there is no dispute of fact and there exists only one conclusion should summary judgment be granted. Id. The Court reasoned that "[b]ecause discrimination cases often depend on inferences rather than on direct evidence, summary judgment should not be granted unless the evidence could not support any reasonable inference for the nonmovant." Id. If, however, "the plaintiff fails to establish a factual dispute on each element of the prima facie case, summary judgment is appropriate." Bialas v. Greyhound Lines, Inc., 59 F.3d 759, 762 (8th Cir. 1995).

The ADA provides that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement, or discharge of employees." 42 U.S.C. §12112(a). The ADA defines the term "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The term "discriminate" is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an . . . employee,

unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

Disability is defined under the ADA to include a physical or mental impairment that substantially limits one or more of the plaintiff's major life activities. 42 U.S.C. § 12102(2)(A). "To 'substantially limit' a major life activity means to render an individual unable to perform a basic function that the average person in the general population can perform, or to significantly restrict the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the average person in the general population." See Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997) (citing 29 C.F.R. Pt. 1630, App. § 1630.2(j)). Factors used to determine whether a person is substantially limited in a major life activity are the nature and severity of the impairment, its duration or anticipated duration, and its long-term impact. See Snow, 128 F.3d at 1207. "Major life activities" include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(1).

The McDonnell Douglas burden-shifting framework applies to claims brought under the ADA. See Snow, 128 F.3d at 1205-06. To establish a prima facie case under the ADA, Mole

must show that: (1) she was "disabled" as defined by the ADA; (2) she was qualified, with or without accommodation, to perform the essential functions of the job; and (3) her termination gave rise to an inference of unlawful discrimination based on her disability. See id. at 1206.

If plaintiff makes out a prima facie case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its actions. See Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir.) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)), cert. denied, 118 S. Ct. 441 (1997). The burden of production then shifts back to the plaintiff to demonstrate that the employer's proffered reason is pretextual. See id. (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993)).

The analysis of disability discrimination is the same under the MHRA. See Mo. Rev. Stat. § 213. 010 (10); Heintzelman v. Runyon, 120 F.3d 143, 145 n.4 (8th Cir. 1997) (citing Sedalia No. 200 Sch. Dist. v. Missouri Comm'n on Human Rights, 843 S.W.2d 928, 930 (Mo. Ct. App. 1992)).

III. Analysis

The court finds that plaintiff did not establish a prima facie case of discrimination. Under the first prong of the test, the Court finds that a fact question exists as to whether Mole was

disabled under the ADA. The medical testimony in the record indicates that MS is a disease that affects different individuals in different ways and affects their lives to varying degrees. At certain points in time since her diagnosis, Mole was depressed to the point that she could do nothing more than sit at home or at her desk crying. Such depression undoubtedly would have affected her ability to perform any job. In addition, the medical testimony indicates that Mole's particular manifestation of the disease affected her cognitive function--her ability to think and to remember instructions, which could also affect her ability to work at a wide range of jobs. While it appears that during the periods that her MS was stable, Mole could have performed a wide range of jobs, the fluctuating nature of her illness provided for several fairly long-term absences that would affect her ability to work. Although the record indicates that Mole's illness has become more stable since her initial diagnosis, Dr. Asher's letter indicates that her illness "will likely fluctuate considerably" over her lifetime. The Court finds this evidence sufficient to raise a fact question regarding whether Mole is disabled under the ADA.

The Court finds, however, that Mole fails on the second and third prongs of the prima facie case. As to the second prong, the Court finds that Mole was not qualified to perform the essential functions of her job. Although the latest memorandum discussing Mole's performance indicated that she had taken a more positive attitude when dealing with customers, she continued to make costly errors. Mole does not dispute that she

made the errors or the significance of those errors. The memorandum also indicated that Mole could not provide proper coverage when Dillman was absent. While the Court recognizes that Mole performed adequately as a customer service coordinator for several years, and in fact received positive evaluations for her performance, her problems in the position since 1991 were well-documented and affected the essential functions of her job.

Even assuming Mole's performance problems in later years were caused or exacerbated by her illness, Mole did not provide in a timely manner any suggested accommodations that would have cured those problems. Mole does not allege that she requested any accommodations during her performance reviews, but instead insisted that she was performing her job "fine." After her termination, when Mole requested her job back, she requested that defendant could accommodate her by allowing her to take breaks when she was having problems with her MS and by again fully staffing the customer service positions. This Court has noted that, while an employer may "initiate a discussion concerning the need for an accommodation when an employee with a known disability is having problems with job performance," the ADA generally imposes upon the employee the duty to request an accommodation. Ferry v. Roosevelt Bank, 883 F. Supp. 435, 440-41 (E.D. Mo. 1995). The Court held that, by initiating a discussion with the employee concerning possible accommodations, the employer shifted the

burden to the employee to request the particular accommodation she believed would enable her to adequately perform the essential functions of her job. See id. at 441. The Court finds that the same reasoning applies in this case. Defendant initiated discussions with plaintiff on several occasions regarding her performance problems and stated a willingness to help her with those problems. Plaintiff did not request any accommodation until after her termination. This request came too late. See Conner v. Reckitt & Colman, Inc., 84 F.3d 1100, 1102 (8th Cir. 1996) (post-termination request for accommodation does not constitute discriminatory act). Even at that time, Mole did not request some of the accommodations that she now asserts would help, such as written instructions. Defendant could not be expected to know that such an accommodation would be helpful to Mole. See Ferry, 883 F. Supp. at 441.

In any event, the Court finds that some of the accommodations requested by Mole after her termination were unreasonable. Although Mole requested "full staffing" of the department, the affidavits submitted by defendant reveal that the department was fully staffed. Defendant is not required to hire additional personnel to complete the essential functions of the position. See 29 C.F.R. Pt. 1630, App. § 1630.2(o) (employer not required to reallocate essential functions); Martinson v. Kinney Shoe Corp., 104 F.3d 683, 687 (4th Cir. 1996) (employer not required to hire additional person).

As to the third prong of the prima facie case, the Court finds that Mole's termination did not give rise to an inference of unlawful discrimination. Mole's negative performance evaluations began before either she or defendant knew or suspected that she had MS. As early as October 1992, Mole received a warning that she would receive "disciplinary action" if her performance did not improve. In her memorandum opposing summary judgment, Mole suggests that because defendant was self-insured, the costs of her future treatment led to her termination. She offers no support, however, for such speculation. Mole's attempt to use defendant's statement that it would not object to Mole filing an unemployment insurance claim also falls far short of a showing of an inference of discrimination.

Even assuming Mole made a prima facie showing of discrimination based on her disability, defendant offered a legitimate, nondiscriminatory reason for her termination--poor job performance. Mole did not submit evidence sufficient to create a factual question on the issue of pretext. Mole's poor evaluations began before she was diagnosed with MS. Mole does not argue that the errors attributed to her did not occur. The deposition testimony submitted by Mole in an attempt to show that others saw her performance "in a much better light than is indicated by Johnston" does not contradict the specific problems that Johnston and others attributed to Mole. The fact that some coworkers and customers who worked with Mole on

a limited basis noticed fewer problems with her performance does not mean that her performance was acceptable. Mole does not dispute that the problems existed.

The Court grants summary judgment to defendant on plaintiff's MHRA claims for the same reasons as those set out above pertaining to plaintiff's ADA claims. See Heintzelman, 120 F.3d at 145 n.4.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment (Doc. 32) is **GRANTED.**

Dated this 15th day of January, 1998.

/s/ George Gunn
GEORGE F. GUNN, JR.
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-1500EMSL		
Kathleen Mole,	*	
Appellant,	*	
	*	Order Denying
v.	*	Petition for
	*	Rehearing and for
Buckhorn Rubber	*	Rehearing En Banc
Products, Inc.,	*	
Appellee.	*	

The petition for rehearing en banc is denied. Judge McMillian would grant the petition.

The petition for rehearing by the panel is also denied.

March 16, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
AUG 10 1999
OFFICE OF THE CLERK

No. 98-1990

IN THE

Supreme Court of the United States

KATHLEEN MOLE,

Petitioner,

v.

BUCKHORN RUBBER PRODUCTS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Buckhorn Rubber Products, Inc., is a wholly-owned subsidiary of Myers Industries, Inc.

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FACTUAL BACKGROUND

Petitioner, Kathleen Mole, ("Mole") was an employee of Respondent, Buckhorn Rubber Products, Inc., ("Buckhorn") with a history of performance problems. During the course of her employment, Mole was diagnosed with multiple sclerosis. Over the course of 3½ years, Buckhorn exercised care, concern, and made every effort to accommodate Mole to enable her to perform her job in a satisfactory manner. Nevertheless, she was unable to do so for reasons completely unrelated to her medical condition.

Mole began her employment with Buckhorn on January 4, 1982 as a temporary clerk/typist in Buckhorn's Sales Customer Service Department at its Hannibal, Missouri facility. When Buckhorn terminated her employment on June 30, 1994, Mole held the title of Customer Service Coordinator and had performed customer service functions for approximately seven years at the Company's Milford, Ohio and Hannibal facilities. Her primary job functions consisted of communicating with Buckhorn customers on the telephone and serving and satisfying their needs in a professional manner. Her duties included providing customers with product information, application, availability, lead-time, pricing, and shipping schedules; receiving, addressing and responding to customer complaints; satisfying customer requests for order follow-up and expediting product shipments; receiving and processing customer order information in an accurate and timely manner; and preparing and then entering customer order information into Buckhorn's computer system on the date it was received, which also included directing the Company's electronic data interchange ("EDI") system. All dealings with customers were to be handled in a manner which reflected their

importance to Buckhorn. Buckhorn customer service representatives were to take every action necessary to satisfy customers' needs.

Two years before Mole was diagnosed with multiple sclerosis, Buckhorn management observed and brought to Mole's attention its serious concerns about her job performance. Mole's immediate supervisor, David Johnston, met with her on numerous occasions to advise her of his dissatisfaction with her work, examples of which included: her rudeness to Buckhorn customers, resulting in certain customers refusing to deal with her; her failure to provide leadership and direction in her department; her general disorganization; her frequent errors in entering key customer information into Buckhorn's computer system and disseminating customer information to other Buckhorn employees, which resulted in delays in scheduling and in receiving customer payments; her mishandling of customer accounts; and her inability to properly utilize the Company's EDI computer system used by major customers in submitting orders. Johnston and Buckhorn's Human Resource Manager, Ron Meyer, warned Mole that a lack of improvement in her job performance and further negative dealings with customers would result in disciplinary action. Significantly, the Company addressed all of the above deficiencies with Mole in the two years prior to her diagnosis with multiple sclerosis.

Even after her diagnosis, when the quality of her work continued to be substandard, Buckhorn management sought to accommodate Mole in every possible manner and repeatedly inquired as to how they could further assist her to raise her performance to an acceptable level. Despite Buckhorn's inquiries, during the entire course of her

employment Mole never requested nor communicated the need for any specific work accommodation, but rather always maintained that she was "fine." The accommodations provided by Buckhorn included, but were not limited to:

1) Providing Mole with fully paid time off for all periods of hospitalization;

2) Providing Mole with fully paid time off for all of her doctor visits;

3) Recommending and referring Mode to a specialist upon learning that she might be ill;

4) Reducing Mole's job responsibilities and workload by redistributing customer accounts without reducing her pay;

5) Allowing Mole to work half days on numerous occasions and be paid for a full day;

6) Granting Mole fully paid leaves of absence;

7) Allowing Mole to take extended break periods;

8) Hiring a temporary employee who assisted Mole with her clerical duties and lessening Mole's workload upon her return from leave of absence;

9) Assisting Mole in getting beta interferon, an experimental medication which her physician

had prescribed for her, approved for coverage by Buckhorn's health insurance carrier;

10) Informing Mole's physician that any additional leaves of absence would not be a problem; and

11) Allowing Mole a lengthy period of time to improve her substandard performance.

Even Mole's own physicians acknowledged that each of the above-listed actions by Buckhorn constituted a reasonable accommodation of Mole's multiple sclerosis.

Despite all of Buckhorn's accommodations, the quality of Mole's job performance continued to decline. She continued to make costly errors processing customer orders but with more frequency. She also continued to interact negatively with customers.

On a number of occasions, Mole sat at her desk and did absolutely nothing. When asked if she needed to go home for the day, Mole declined, but her duties frequently had to be completed by other employees.

On February 10, 1994, Johnston met with Mole to address her continuing performance problems. During their meeting, Johnston outlined five significant errors and omissions by Mole. He emphasized that her performance had not improved and she continued to conduct herself inappropriately with customers. He further advised Mole that continued lack of improvement would lead to the termination of her employment. At no time did Mole ever indicate the need for any assistance or accommodation from Buckhorn

to help her perform her job. Coincidentally, from January through July, 1994, the six months immediately prior to her discharge, Mole's physician found her multiple sclerosis to be in remission and not active, and described her office examinations as being "quite good." Mole's physician further acknowledged the absence of any clinical findings that would have precluded Mole from performing her job duties at Buckhorn during this period of time. Indeed, Mole acknowledged that she was not experiencing any problems with her multiple sclerosis during this time period and there was nothing about her medical condition that prevented her from performing her job at an acceptable level. Nevertheless, despite her improved medical condition, Mole's job performance continued to decline during the first half of 1994.

Buckhorn finally determined that it could no longer endure Mole's inadequate job performance in a customer service capacity. After determining that it did not have any other available positions for her, the Company terminated Mole's employment effective June 30, 1994. On July 14, 1994, two weeks after her termination, Mole returned to the Company and demanded her job back as an accommodation. Based on the unsatisfactory quality of her work demonstrated over a three and one-half year period, the Company rejected her demand.

STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA") provides that:

> [no] covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to . . . the hiring, advancement or discharge of employees.

42 U.S.C. § 12112(a)(1995).

The ADA further defines "qualified individual with a disability" as:

> an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.

42 U.S.C. § 12111(8)(1995).

REASONS FOR DENYING THE WRIT

I.

THE WRIT MUST BE DENIED BECAUSE THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS AS TO THE DISPOSITIVE ISSUE IN THIS CASE; SPECIFICALLY, THAT MOLE BEARS THE BURDEN OF PROVING THAT SHE WAS A "QUALIFIED INDIVIDUAL" UNDER THE AMERICANS WITH DISABILITIES ACT.

A. Mole misstates the law in claiming that the Fifth and Sixth Circuits are in conflict with the other circuit courts of appeals in requiring the employer to bear the burden of proof on the issue of whether an employee is a "qualified individual" under the ADA. In fact, all of the cases in those circuits, as in every other circuit, place the burden of proof on the employee.

The Eighth Circuit's decision and method of analysis in this case is consistent with every recent case in every other circuit under the ADA.

In order to claim the benefit of the ADA, an employee must be a "qualified individual," 42 U.S.C. § 12112(a) — that is a person with a disability who can perform the essential functions of her job, with or without reasonable accommodations. 42 U.S.C. § 12111(8) (1995). Mole argues that the Eighth Circuit erred in assigning her the burden of production and the burden of proof on the issue of whether she was a "qualified individual" under the ADA. Mole asserts that this Court should hear her case because other circuit courts of appeals, namely the Fifth and Sixth Circuits, place these burdens on defendant employers, rather than on plaintiff employees.

Mole's assertion is incorrect. Every circuit court of Appeals has applied the same standard of proof in such cases. The circuits universally require the plaintiff to bear both the burden of production and the burden of persuasion on the issue of whether she is a "qualified individual" under the ADA. This burden applies to all claims brought under the ADA whether alleged under a theory of failure to accommodate, disparate impact, or disparate treatment.

Attempting to manufacture a split among the circuits where no such split exists, Mole misstates the controlling precedent of both the Fifth and Sixth Circuits. The Fifth Circuit has consistently held that an employee bears the burden of proof as to whether she is a "qualified individual" under the ADA. "[Plaintiff] has the burden of proving that she can perform, with or without reasonable accommodation, all of the essential elements of her job." *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758, 763 (5th Cir. 1996). In *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090, 1093 (5th Cir. 1996), the Court stated:

> [t]o avoid summary judgment on whether he is a qualified individual, [Plaintiff] Turco needs to show (1) that he could perform the essential functions of the job in spite of his disability; or (2) that a reasonable accommodation of his disability would have enabled him to perform the essential functions of the job.

Indeed, the Fifth Circuit could not have been any more unequivocal on this issue than in *Rizzo v. Children's World Learning Ctrs., Inc.*, 173 F.3d 254, 262 (5th Cir. 1999), stating: "[t]he district court properly assigned to [Plaintiff] Rizzo the burden of proving she was a qualified individual with a disability."

The Sixth Circuit has also held with unmistakable clarity that the plaintiff bears the burden of proving that she is a "qualified individual." "[T]he disabled individual always bears the burden of proving that he or she is 'otherwise qualified' for the position in question, absent the challenged job function or with the proposed accommodation." *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996). "To satisfy the second element of the *prima facie* standard, an employee 'must establish that a reasonable accommodation is possible, and bears a traditional burden of proof that she is qualified for the position with such reasonable accommodation.' " *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 781 (6th Cir. 1998) (citing *Monette*, 90 F.3d at 1186 n.12).[1]

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1. *See also Hamlin v. Charter Township of Flint*, 165 F.3d 426, 429 (6th Cir. 1999) (citing *Monette*, 90 F.3d at 1186) (stating that to establish a *prima facie* case of employment discrimination, the **employee** must show that he or she is " 'otherwise qualified' for

(Cont'd)

The precedent of the Fifth and Sixth Circuits is unremarkable in light of this Court's statement, albeit in dicta that:

> [a]n ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" — that is, a person 'who, with or without reasonable accommodation, can perform the essential functions' of her job.

Cleveland v. Policy Management Systems Corp., __ U.S. __, 119 S. Ct. 1597, 1603 (1999) (quoting 42 U.S.C. § 12111(8)).

The Fifth and Sixth Circuits are in harmony with all other circuits in requiring that plaintiff bear both the burden of production and the burden of persuasion or to whether she is a "qualified individual."[2] This burden is plaintiff's in all ADA

(Cont'd)
the position despite the disability"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) (stating that plaintiff's *prima facie* case under the ADA requires **plaintiff** to establish that "he is qualified, that is, with or without a reasonable accommodation, which he must describe, he is able to perform the essential functions of the job") (citation omitted); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 882 (6th Cir. 1996) (stating that **plaintiff** must establish that "she was qualified for the position, with or without accommodation" as part of her *prima facie* case) (emphasis added).

2. • *First Circuit.* "The **[plaintiff]** bore the burden of showing that [she] was qualified to perform, either with or without reasonable accommodation, the essential functions of her job." *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 142-44 (1st Cir. 1997) (citing *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996)) (footnote omitted); *cf. Champagne v. Servistar Corp.*, 138 F.3d 7, 12 (1st Cir.
(Cont'd)

(Cont'd)
1998) (**employee** bears the burden of proof on whether he or she is qualified); *Jacques v. Clean-Up Group, Inc.*, 96 F.3d 506, 511 (1st Cir. 1996) (stating that in order to establish reasonable accommodation case, **plaintiff** must show that she can perform essential job functions) (appeal of denial of motion for judgment notwithstanding the verdict dismissed) (emphasis added);

• *Second Circuit.* **Plaintiff** must establish a *prima facie* case of failure to accommodate by showing "that with reasonable accommodation, he could perform the essential functions of the position sought" and that "the employer has refused to make such accommodations" *Stone v. City of Mount Vernon*, 118 F.3d 92, 95-96 (2nd Cir. 1997) (citing *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2nd Cir. 1995), *cert. denied*, 522 U.S. 1112 (1998)); *Borkowski v. Valley Central School District*, 63 F.3d 131, 137-38 (2nd Cir. 1995) (Rehabilitation Act case) ("**plaintiff** bears the burden of-[production and persuasion] either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions") (emphasis added);

• *Third Circuit.* **Plaintiff** is required to establish *prima facie* case and carry burden of proof on issue of reasonable accommodation. *Lawrence v. National Westminster Bank of New Jersey*, 98 F.3d 61, 69-70 (3rd Cir. 1998) (emphasis added);

• *Fourth Circuit.* "In order to establish a *prima facie* case under the ADA, **[plaintiff]** must prove that . . . he is otherwise qualified for the job in question." *Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 197 (4th Cir. 1997); *Runnebaum v. Nationsbank of Md., N.A.*, 123 F.3d 156, 174-75 (4th Cir. 1997) (stating that **plaintiff** bore burden of establishing *prima facie* case on the issue of whether he was "otherwise qualified" for job) (emphasis added);

• *Seventh Circuit.* "The **plaintiff** bears the burden of proof on this issue; she must be able to show that she is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim."
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Weilar v. Household Fin. Corp., 101 F.3d 519, 524-25 (7th Cir. 1998) (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 n.3 (7th Cir. 1995)); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.2d 1019, 1022 (7th Cir. 1997). ("No matter the type of discrimination alleged — either disparate treatment or failure to provide or reasonable accommodation — a **plaintiff** must establish first that he was a qualified individual with a disability."); *Weigel v. Target Stores*, 122 F.3d 461, 465 n.3 (7th Cir. 1997) (citing cases from six other circuits for the proposition that **plaintiff** is required to establish that she is a qualified individual as part of her *prima facie* case); *Miller v. Illinois Dep't of Corrections*, 107 F.3d 483, 484-85 (7th Cir. 1997) ("Under the ADA, the employer avoids all liability if the **plaintiff** would have been fired because incapable of performing the essential functions of the job, and the burden of proof on the issue of capability is not on the employer but on the **plaintiff.**") (citing *Weiler v. Household Fin. Corp.*, 101 F.3d 519, 524 (7th Cir. 1996), *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1284 (7th Cir. 1996)); *Cochrum v. Old Ben Coal Co.*, 102 F.3d 908, 911 (7th Cir. 1996) ("The **plaintiff** bears the burden of proof to show he is a 'qualified individual.' ") (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995)); *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 563 (7th Cir. 1996) ("The **plaintiff** bears the burden of proof on this issue; he must be able to show that he is a 'qualified individual with a disability' in order to successfully prosecute an ADA claim" (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 797 (7th Cir. 1995) (emphasis added);

• *Eighth Circuit.* To establish *prima facie* case under the ADA, **plaintiff** must demonstrate that "he or she is qualified to perform the essential functions of the job (either with or without reasonable accommodation)" *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1998) (citing *Price v. S-B Power Tool*, 75 F.3d 362, 364 - 65 (8th Cir. 1996), *cert. denied*, 519 U.S. 910 (1996), *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)) (emphasis added);

• *Ninth Circuit.* **Plaintiff** "bears the burden of establishing an ADA violation, [therefore] she must establish the existence of

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specific reasonable accommodations that [the employer] failed to provide." *Memmer v. Marin County Courts*, 169 F.3d 630, 633 (9th Cir. 1999) (citing *Weinrich v. Los Angeles County Metro Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997), *cert. denied*, 522 U.S. 971 (1997), *Barnett v. U.S. Air*, 157 F.3d 744, 748-49 (9th Cir. 1998)); *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (9th Cir. 1997); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351, 1353 (9th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) (emphasis added);

• *Tenth Circuit.* **Plaintiff** bears burden of producing "sufficient . . . facial showing that accommodation is possible.") *White v. York Int'l Corp.*, 45 F.3d 357, 360-61 (10th Cir. 1995) (emphasis added);

• *Eleventh Circuit.* **Plaintiff** must show that she "is a qualified individual"; "Moreover, the burden of identifying an accommodation that would allow a qualified individual to perform the job rests with that individual, as does the ultimate burden of persuasion with respect to demonstrating that such an accommodation is reasonable." *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285-86 (11th Cir. 1997) (citing *Willis v. Conopco*, 108 F.3d 282, 283 (11th Cir. 1997)); *Holbrook v. City of Alpharetta, Ga.*, 112 F.3d 1522, 1526 (11th Cir. 1997) (stating that **plaintiff** must prove "he is a qualified individual" (citation omitted); "The **plaintiff** retains at all times the burden of persuading the jury that reasonable accommodations were available.") (citing *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996), *cert. denied*, 519 U.S. 1118 (1997)); *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-85 (11th Cir. 1997) (concluding that **plaintiff** bears both burden of production and burden of persuasion on issue of reasonable accommodation) (citing *Barth v. Gelb*, 2 F.3d 1180, 1186 (D.C. Cir. 1993), *cert. denied*, 511 U.S. 1030, 128 L. Ed. 2d 190 (1994) (emphasis added).

• *D.C. Circuit.* **Plaintiff** bears burden of production and burden of persuasion. *Aka v. Washington Hosp. Center*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (*en banc*) (incorporating analysis set forth in *Barth*, 2 F.3d at 1186).

cases brought under theories of failure to reasonably accommodate, disparate treatment or disparate impact. Mole's attempt to avoid proving an essential element of her claim, that she was a "qualified individual," is not supported by controlling precedent in any United States Circuit Court of Appeals. In this case the Eighth Circuit correctly applied the law, as uniformly utilized by every other federal appeals court, and concluded that Mole failed to prove that she was a "qualified individual" as defined by the ADA, and that she was therefore not covered by the Act. Accordingly, certiorari must be denied.

B. In arguing that the Eighth Circuit improperly applied the *McDonnell Douglas* analytical framework, Mole mischaracterizes the Court's decision. Under any analytical framework, she bore the burden of production and the burden of persuasion.

Mole also erroneously argues that the Eighth Circuit applied the type of burden shifting analysis which this Court fashioned in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) for proving discrimination through indirect evidence. She compounds this error by arguing that the Eighth Circuit's alleged application of the *McDonnell Douglas* analysis led to an erroneous allocation of the burden of production and the burden of persuasion.

This is simply not so. First, the Eighth Circuit did not apply a *McDonnell Douglas* burden shifting analysis, as Mole suggests, to reach its conclusion that Mole was not a "qualified individual" entitled to ADA protection. Mole alleged that Buckhorn failed to reasonably accommodate her known disability and terminated her based on that disability. The Eighth Circuit dismissed Mole's claim under both

theories because: (1) Mole was not a "qualified individual" (a necessary element of both her claim for failure to reasonably accommodate and her claim for wrongful termination based on disability) and (2) she failed to establish that Buckhorn acted with discriminatory intent (a necessary element only of her claim for wrongful termination based on disability). In concluding that Mole was not a "qualified individual," the Eighth Circuit did not perform the type of burden shifting involved in a *McDonnell Douglas* analysis but rather affirmed the District Court based on undisputed evidence which established:

> Buckhorn documented serious performance deficiencies beginning in 1991 and Mole's failure to meet repeated demands for improved performance from 1992 until she was terminated in June 1994.
>
> * * *
>
> Buckhorn documented Mole's order inaccuracies and poor customer relations over an extended period of time. While admitting these deficiencies, Mole argues they were minor, citing testimony by co-workers and one customer expressing positive opinions about her job performance. However, these persons had much more limited contact with Mole and her work than [Buckhorn's sales manager, industrial relating manager, and customer service representative]. Mole bears the ultimate burden of proof on this issue, *See Benson*, 62 F.3d at 1113, and "consideration shall be given to the employer's judgment as to what functions of the job are essential." 42 U.S.C. § 12111(8).

Mole v. Buckhorn Rubber Products, Inc., 165 F.3d 1212, 1217 (8th Cir. 1999).

The Eighth Circuit correctly concluded that summary judgment was appropriate because "Mole failed to present sufficient evidence that she could meet Buckhorn's legitimate job expectations with or without reasonable accommodation of her alleged disabilities." *Id.*, at 1218 (citation omitted). Because the Eighth Circuit held that Mole failed to establish the second element of her *prima facie* case, it did not need to address the issue of pretext or burden-shifting in arriving at its decision.[3] Since Mole failed to establish the necessary elements of her *prima facie* case, none of the distinguishing characteristics of the *McDonnell Douglas* analytical matrix played any role in the Eighth Circuit's affirmance of summary judgment.

Just as importantly, the circuit courts have not recognized any difference between the plaintiff's burden of proof on the issue of whether she is a "qualified individual" regardless of whether plaintiff claims a failure to "reasonably accommodate" her disabilities, disparate treatment, or disparate impact. "The disabled individual always bears the burden of proving that he or she is 'otherwise qualified' for the position in question, absent the challenged job function

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3. Nevertheless, in its opinion, the Eighth Circuit found alternative grounds for affirming summary judgment based on Mole's failure to establish the third prong of her *prima facie* case, *i.e.*, that she was discharged "under circumstances that raise an inference of unlawful disability discrimination." *Id.*, at 1216 (citation omitted). The Eighth Circuit based its conclusion on the undisputed fact that Mole's poor job performance evaluations began long before Buckhorn knew she had multiple sclerosis and continued for more than a year after the initial diagnosis. *Id.*

or with the proposed accommodation." *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1184 (6th Cir. 1996) (citing *Norcross v. Sneed*, 755 F.2d 113, 116-17 (8th Cir. 1985)). "[N]o matter the type of discrimination alleged — either disparate treatment or failure to provide a reasonable accommodation — a plaintiff must establish first that he was a qualified individual with a disability." *Sieberns*, 125 F.3d at 1022 (7th Cir. 1997). Therefore, consistent with all of the other circuits, the Eighth Circuit properly placed both the burden of production and the burden of persuasion on Mole on the issue of whether she was a "qualified individual."

II.

THIS COURT NEED NOT GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE BURDEN OF PROOF IN ADA CASES AND CASES DECIDED UNDER THE REHABILITATION ACT OF 1973 ("REHABILITATION ACT"). PRIVATE EMPLOYERS DO NOT HAVE THE SAME DUTY OF AFFIRMATIVE ACTION THAT HAS BEEN PLACED ON FEDERAL EMPLOYERS UNDER SECTION 501 OF THE REHABILITATION ACT.

Mole cites the Fifth Circuit's decision in *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981), a case involving a federal employer with a duty of affirmative action under § 501 of the Rehabilitation Act of 1973, (the "Rehabilitation Act") in support of her argument that private employers have the burden of production and the burden of persuasion on the issue of whether an employee is a "qualified individual" under the Rehabilitation Act. Mole correctly states that a number of circuits have placed the burden of production and burden of persuasion on federal

employers in cases decided under § 501 of the Rehabilitation Act.[4] However, both Congress and the courts have drawn a clear distinction between the affirmative action duties placed on federal employers under § 501 of the Rehabilitation Act and the duties placed on private employers.

Section § 791(g) of Title 42 makes it readily apparent and clear that Congress did not view cases involving the

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4. *Hall v. United States Postal Service*, 857 F.2d 1073, 1077 (6th Cir. 1988) ("[S]ection 501 of the Act requires federal employers . . . to undertake *affirmative action* on behalf of the handicapped. (Citation omitted). This affirmative action obligation goes beyond the obligation set forth in section 504, which by its terms, requires only non-discrimination." (Citing *Southeastern Community College v. Davis*, 442 U.S. 397, 410-11 (1979)); *see Fuller v. Frank*, 916 F.2d 558, 561 n.3 (9th Cir. 1990) ("This section requires that the Postal Service (along with all federal executive branch agencies) "submit . . . an affirmative action program plan for hiring, placement, and advancement of individuals with handicaps. . . ."); *Gardner v. Morris*, 752 F.2d 1271, 1277 (8th Cir. 1985) ("Section 501(b), 29 U.S.C. § 791(b) requires the federal government as an employer to develop and implement affirmative action plans on behalf of handicapped employees.") (footnote omitted); *Treadwell v. Alexander*, 707 F.2d 473, 475 (11th Cir. 1983) ("Section 501 imposes on federal agencies a duty to take affirmative steps to ensure that handicapped individuals have equal access to employment opportunities in the federal government.") (footnote omitted).

But cf. Barth, 2 F.3d at 1186 (placing burden of production and burden of proof on government employee/plaintiff); *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (placing burden of proof on plaintiff); *Leary v. Dalton*, 58 F.3d 748, 753 (1st Cir. 1995) ("[Plaintiff] must also show that with respect to his employment, he is a qualified individual with a [disability] who, with or without reasonable accommodation, can perform the essential functions of the position in question.") (citing 29 C.F.R. at 1614.203(a)(6) (internal quotation marks omitted).

federal government's duty of affirmative action in the same way that it viewed ADA cases. In § 791(g), Congress stated:

> The standards used to determine whether this section has been violated in a complaint alleging **non-affirmative action** employment discrimination under this section shall be the standard applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

(Emphasis added).

This Court in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), stated:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome disabilities caused by handicaps. Section 501(b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . ." include description of the extent to which and methods whereby the special needs of handicapped individuals are being met. However, because "[s]ection 504 [governing grantees] does not refer at all to

> affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.

Id., at 410-11. *See also Alexander v. Choate*, 469 U.S. 287, 300 n.20 (1984) ("it is clear from the context of *Davis* that the term 'affirmative action' referred to those 'changes,' 'adjustments,' or 'modifications' to existing programs that would be 'substantial,' . . . or that would constitute 'fundamental alteration[s] in the nature of a program . . . ,' . . . rather than to those changes that would be reasonable accommodations.") (citation and internal quotation marks omitted).

"Section 501's provision for affirmative action in addition to section 504's prohibition of discrimination against the disabled indicates that federal employers are charged with a greater duty to ensure the employment of disabled workers than are federal grantees or private employers." *Woodman v. Runyon*, 132 F.3d 1330, 1337 (10th Cir. 1997) (citing *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979)).

> Thus, while the ADA and the Rehabilitation Act *generally* are to be interpreted and applied consistently with one another, . . . the standards used to determine whether a federal employer has violated section 501 of the Rehabilitation Act will not always be identical to those employed in suits brought under section 504 or under the ADA.

Smith v. Midland Brake, Inc., 138 F.3d 1304, 1311 (10th Cir. 1998) (citations omitted). In *Smith*, the Tenth Circuit concluded that although a federal employer had a duty to reassign a federal employee to a vacant position, a private employer had no such duty.

The Fifth Circuit, the same court that decided *Prewitt*, assigned the burden of proof to the plaintiff in a case against a non-federal employer under § 504 of the Rehabilitation Act. In *McGregor v. Louisiana Univ. Bd. of Supervisors*, 3 F.3d 850, 858 (5th Cir. 1993), the Court stated that: "McGregor, therefore is entitled to the requested accommodations only if he can demonstrate that the accommodations constitute reasonable deviations from the Law Center's usual requirements 'which meet [his] special needs without sacrificing the integrity of the Law Center's program." *Id.* (citation and internal quotation marks omitted). *See Borkowski v. Valley Central School District*, 63 F.3d 131, 137-38 (2nd Cir. 1995) (Rehabilitation Act case) ("plaintiff bears the burden of [production and persuasion] either that she can meet the requirements of the job without assistance, or that an accommodation exists that permits her to perform the job's essential functions").

Contrary to the Rehabilitation Act cases assigning the burden of proof to federal employers, none of the federal courts has found that a private employer bears the burden of proof on the issue of whether a plaintiff is a "qualified individual" in a "reasonable accommodation" case under the ADA.

Mole further asks this Court to depart from all of the federal court decisions which have found that an employee bears the burden of proof under the ADA based on statements

in the legislative history which did not become part of the statute. Here, as in *Davis*, 442 U.S. at 411 n.11, the Court should decline to give force of law to statements which were not incorporated into the statute.

CONCLUSION

The Petition for Writ of Certiorari should be denied. The only grounds asserted by Mole as a basis for this Court's Jurisdiction are a purported split by two of the Circuit Courts of Appeals in the allocation of the burden of proof in ADA cases. Mole is flatly wrong in that assertion. There is no basis for the exercise of this Court's jurisdiction.

Respectfully submitted,

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